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IN THE

Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P., *et al.*,

Petitioners,

v.

WAYNE SMITH, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF ASSOCIATION OF AMERICAN RAILROADS TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37.2(b), the Association of American Railroads requests leave to file the accompanying brief as *amicus curiae* in support of the Petition for a Writ of Certiorari. While Petitioners Sprint Communications Co., Qwest Communications Corp., and Level 3 Communications L.L.C. have consented to the filing of this brief, Petitioner WilTel Communications L.L.C., Respondents Chem-Tronics, Inc., Daniel R. Buhl, Joe C. Meighan, Charles W. Hord and Joy Pratt-Hord, and counsel for plaintiffs (respondents "by rule" under Rule 12.6 of the Rules of this Court) have withheld consent, necessitating the filing of this motion.[1]

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest. AAR seeks leave to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad industry as a whole – and in those instances such requests have been granted.[2]

The railroad industry has a strong interest both in preserving the fair national settlement approved by the district court in this case and in having this Court definitively interpret Rule 23 to facilitate national settlements in other, poten-

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[1] Letters from Petitioners Sprint Communications Co. L.P., Qwest Communications Corp., and Level 3 Communications L.L.C.granting consent to the filing of an *amicus curiae* brief by the Association of American Railroads have been lodged with the Clerk of the Court.

[2] *E.g., Consol. Rail Corp. v. Richards*, 540 U.S. 1096 (2003); *Nat'l R.R. Passenger Corp. v. Griesser*, 534 U.S. 970 (2001); *Kansas City S. Ry. Co. v. Giddens*, 532 U.S. 990 (2001); *Metro-North Commuter R.R. v. Buckley*, 519 U.S. 958 (1996); *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). All granting motion of AAR to participate as *amicus curiae*.

tially similar class action litigation. Consistent with its goals, and the interests it is intended to protect, Rule 23 should be construed to permit global resolution of class actions involving integrated, national industries. The alternative–an outcome which inevitably flows from the decision below–of requiring protracted, state-based, multiple class action lawsuits to resolve such disputes, presents a scenario that is at odds with the fundamental policy that has consistently guided Congressional treatment of railroads: that uniformity best promotes a safe and efficient rail network. Indeed, the admonishment of the dissenting judge, that the majority opinion "imprudently reject[s] the preferred treatment of this nationwide infrastructure,"[3] though referring to the telecommunications industry, resonates loudly with the nation's railroads.

As Petitioners point out, the Seventh Circuit's holding in this case is "tantamount to a rule that [complex nationwide litigation] may never be settled in any comprehensive efficient manner." Pet. for Cert. at 27. Thus, if allowed to stand, this holding not only will impact the settlement in this case, but could well have ramifications for the railroad industry in the future in the eventuality that railroads become ensnared in other litigation that is susceptible to class treatment. Most assuredly, the Seventh Circuit's holding will relegate the resolution of similar complex litigation to multiple state-based class actions, with plaintiffs pursuing different state law remedies. From the standpoint of the railroads, this invites application a patchwork of state rules and policies, an approach which Congress has generally found unsuitable.

Inasmuch as the requirements of Rule 23 have been met in this case, AAR agrees with petitioners that class certifica-

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[3] *Smith v. Sprint Communications Co.*, 387 F.3d 612, 618 (7th Cir. 2005) (Cudahy, J., dissenting).

tion for the purpose of settlement was appropriate, and the erroneous ruling of the Seventh Circuit warrants review. To be sure, some members of AAR have a direct interest in resolving this litigation.[4] However, of even greater importance is preserving the option, apparently foreclosed by the ruling below, of resolving future complex commercial disputes that might involve multiple railroads through a nationwide class action settlement. Significantly, preserving such an option would be consistent with the long-standing public policy that demands consistent, uniform rules applicable to railroads. Therefore, the railroads urge this Court to review the decision below, which would, as Judge Cudahy noted in his dissent, "forfeit[] the manifest advantages of a national settlement for a national undertaking." *Smith v. Sprint Communications Co.*, 387 F.3d 612, 617 (7th Cir. 2005) (Cudahy, J., dissenting).

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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[4] Union Pacific is a defendant in 11 similar fiber optic class action lawsuits in federal and state court, eight of which are subject to the national settlement reached below. Burlington Northern Santa Fe Railway Co. and CSX Transportation, Inc. each are defendants in seven similar fiber optic class action lawsuits in federal and state court, and Norfolk Southern Railway Co. is a defendant in two similar lawsuits in federal and state court.

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Dated: May 16, 2005

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STATEMENT OF INTEREST

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak.[1] AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest. AAR submits briefs *amicus curiae* in cases that raise an issue of great significance to the railroad industry as a whole.

This case involves the nation's modern communications infrastructure, which in large part runs along the nation's rail infrastructure. When the telegraph emerged as a major communications provider in the 19th Century, a business described as the "Victorian internet,"[2] many telegraph lines followed the railroad right of way and became an integral part of transcontinental railroad operations. The telegraph gave way to the new technology of the telephone, and now, in the 21st Century, the railroads communicate across the country on the internet or through telecommunications equipment. The modern voice and data internet is based on fiber optics instead of wires, but, like its predecessor, it generally follows the railroad rights-of-way to create a nationwide, transcontinental network.[3]

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[1] In accordance with Rule 37.6, *amicus curiae* states that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than the *amicus* and its members, has made a monetary contribution to the preparation or submission of this brief.

[2] *See* Tom Standage, *The Victorian Internet: The Remarkable Story of the Telegraph and the Nineteenth Century's On-Line Pioneers* (Walker & Co. 1998).

[3] *See Mellon v. S. Pac. Transport Co.*, 750 F. Supp. 226, 230 (W.D. Tex. 1990) (installation of fiber optic cable in railroad right of way "is the modern application of its antecedent the telegraph line").

The railroad industry has a strong interest both in preserving the national settlement approved by the district court in this case and in having this Court definitively interpret Rule 23 consistently with its underlying public policy purposes to facilitate national settlements in other potentially similar class action lawsuits involving integrated, national industries. The decision below would reach the opposite result, relegating this case and other controversies impacting nationwide businesses to adjudication in protracted and burdensome litigation in multiple jurisdictions.

A number of AAR members have a direct interest in this litigation, as they will be included among the Right of Way providers released from the claims if the national settlement is upheld.[4] Similar fiber-optic class action suits are pending but are not currently subject to the national settlement. However, of even greater importance to *amicus* is preserving the option, apparently foreclosed by the ruling below, of resolving future complex commercial disputes that might involve multiple railroads through a nationwide class action settlement. Significantly, preserving such an option would be consistent with the long-standing public policy that demands consistent, uniform rules applicable to railroads.

STATEMENT OF THE CASE

Amicus adopts and incorporates Petitioners' statement of the case.

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[4] Union Pacific is a defendant in 11 similar fiber optic class action lawsuits in federal and state court, eight of which are subject to the national settlement reached below. Burlington Northern Santa Fe Railway Co. and CSX Transportation, Inc. each are defendants in seven similar fiber optic class action lawsuits in federal and state court, and Norfolk Southern Railway Co. is a defendant in two similar lawsuits in federal and state court.

SUMMARY OF ARGUMENT

Class action practice developed to promote the efficient administration of justice while being mindful of the interests of the individual parties. The Seventh Circuit's decision below both disregards the public policy underpinnings of Rule 23 and misconstrues this Court's jurisprudence regarding the settlement of class actions.

In rejecting the settlement class on the ground that plaintiffs' counsel were somehow "disarmed," the appeals court also overlooked a well-known aspect of trial practice: the immense power that the threat of multiple class action lawsuits gives class counsel as they engage in settlement discussions. The Seventh Circuit's apparent failure to note the potential impact of class certification on settlement negotiations is mystifying, given that Judge Posner of that court eloquently described this impact fifteen years ago as forcing defendants into "blackmail settlements." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

Even if there were any doubt that this settlement class should be approved, which there is not, the federal interest in maintaining a uniform and thriving transcontinental telecommunications/railroad network and the associated interstate commerce issues strongly support facilitating the federal class action settlement.

Guidance from the U.S. Supreme Court regarding the approval of a settlement class under these circumstances is badly needed. For these reasons, *amicus curiae* respectfully requests that the Petition for Writ of Certiorari be granted.

ARGUMENT

I. THE HISTORY AND PUBLIC POLICY UNDERLYING CLASS ACTION PRACTICE SUPPORTS CERTIFICATION OF A NATIONWIDE SETTLEMENT CLASS.

A. Since Their Inception, Class Action Rules Have Been Intended To Enhance The Efficient Administration of Justice.

Class action practice developed to promote efficiency and avoid waste in the resolution of legal claims. In recent years, class action abuse has resulted in excessive, often duplicative lawsuits and unnecessary expense to litigants, the judicial system and the public at large.[5] These developments underscore the need for courts to be mindful of the doctrine's underlying purpose when they resolve questions about certification of both litigation and settlement classes.

The doctrine's purpose of promoting the efficient administration of justice was set forth as early as 1833, when the federal courts adopted their first provision on group litigation, Equity Rule 48.[6] It continued to support group action rules throughout their various iterations, including a significant rewrite of class action rules in the adoption of the first version of the Federal Rules of Procedure in 1938.[7] The

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[5] *See* S. Rep. No. 109-14, at 4-27 (2005) (discussing numerous abuses of class action rules and the Class Action Fairness Act of 2005).

[6] Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 10 (2000) (stating that Equity Rule 48 allowed for representative actions "when the parties on either side were too numerous for convenient administration of the suit.").

[7] *See id.* at 10-11 (discussing overhaul of Equity Rules in early 20th century; Equity Rule 38 continued to allow for group actions "[w]hen the question is one of common or general interest to many persons constitut-

learned U.S. Second Circuit of Appeals Judge Charles E. Clark, Reporter to the original Advisory Committee on Rules and the "principal architect of the Federal Rules of Civil Procedure,"[8] explained at the time that class certification in appropriate cases "saves time and expense for the litigants and the courts; it represents the difference between a single and permanent surgical operation as compared to chronic physicking."[9] The intent to enhance efficiency and consistency in litigation results similarly underscored the substantial revision of Rule 23 in 1966.[10]

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ing a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.").

[8] *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 297 (1973).

[9] Charles E. Clark, *The New Rules of Federal Civil Procedure: The Last Phase – Underlying Philosophy Embodied in Some of the Basic* Provisions *of the New Procedure*, 26 Am. Bar Ass'n J. 976, 977 (1937) (also noting that "[e]ven from the standpoint of the court records, of simplifying and reducing the permanent history of litigation, there is a gain.").

[10] *See* James M. Underwood, *Rationality, Multiplicity and Legitimacy: Federalization of the Interstate Class Action*, 46 S. Tex. L. Rev. 391, 418-19 (2004). Unfortunately, the 1966 revision of Rule 23 had the opposite effect than intended, primarily due to the switch from an "opt in" to an "opt out" requirement for members of damages classes. *See id.* Class action litigation exploded in the years following the Rule 23 revisions, and soon became the subject of abuse. *See* Report of the Judicial Conference Committee on Rules of Practice and Procedure 8 (Sept. 2002) ("[I]n the now almost 40 years since [the 1966 amendments], Rule 23 has figured prominently in the explosive growth of large-scale group litigation in federal and state courts . . . ."); Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 Harv. J. on Legis. 483 (2000) (discussing opportunities for and instances of class action abuse).

B. The National Class Settlement Would Resolve These Claims Efficiently and Uniformly While Safeguarding the Interests of All Litigants.

Approval of the settlement class would provide the efficient and uniform resolution of legal claims envisioned by the drafters of Federal Rule 23. First, the settlement would end years of expensive, protracted litigation in 32 state and federal jurisdictions, providing agreed-upon compensation to the plaintiffs and allowing defendants to invest their resources in such things as research and development of new and improved consumer and business technologies instead of in legal fees.

Next, as a national settlement of disputes involving a still-developing nationwide industry, approval of the settlement class would provide uniformity and certainty to the defendant companies as to their legal rights and obligations, allowing them to most effectively plan ahead to grow their businesses. This predictability would extend to the defendants' existing and potential business partners, who would be able to advance their own business plans accordingly.

In short, if the Court does not uphold the certification of this nationwide settlement class, the resulting piecemeal state court lawsuits will delay the resolution of the class members' claims, in all likelihood for years, in exactly what Judge Clark likened to "chronic physicking." Individual federal and state class actions will unnecessarily increase the litigation costs to the parties, the courts and the public. In addition, these additional costs will likely be passed on to consumers or taxpayers in higher prices, taxes and fees.

Approving the settlement class will further Rule 23's fundamental goal of the efficient administration of justice – without interfering with the rights of the litigants.

C. The Different Balancing of Interests Required Militates Against Linking Settlement Class Certification to the Availability of Litigation Class Certification.

Courts considering certification issues are to consider the individual interests of the litigants on each side of the case, as well as the interests of the public and courts in an efficient, timely and cost-effective justice system. The approach to balancing all of these interests varies, depending on the dynamics of a case and whether certification is sought for a settlement class or a litigation class. Because of the different weighing of the interests involved, the inability to obtain certification of a litigation class should not affect the ability to obtain certification of a settlement class.

For example, unlike courts handling motions for certification of litigation classes, a court faced with a request for settlement-only certification "need not inquire whether the case, if tried, would present intractable management problems [under Rule 23(b)(3)(D)], for the proposal is that there be no trial." *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Similarly, where, as here, the plaintiff class and the defendants have reached a settlement after years of costly litigation, there should be no need to conduct a hypertechnical analysis of the Rule 23 commonality and predominance requirements. Instead, the court should consider whether the material questions of fact and law in the case create "sufficient unity for settlement class certification purposes." *Smith v. Sprint Communications Co.*, 387 F.3d 612, 618 (7th Cir. 2004) (Cudahy, J., dissenting). In this way, a court has the flexibility to appropriately balance the interests of different parties, achieving the parties' explicit interests in a uniform, final and comparatively economical resolution of their legal claims, and carry out the Rule's interest in the efficient administration of justice.

A proposal for a nationwide settlement class can pass this balancing test, even though a proposal for a nationwide litigation class in the same case would rightly fail. For example, in another fiber optics case, Judge Posner overturned an order certifying a litigation class where the district judge failed to conduct a rigorous analysis of certification issues before certifying the class. *Isaacs v. Sprint Corp.*, 261 F.3d 679 (7th Cir. 2001). Judge Posner wrote: "The rule could not be clearer, and this is hardly a case in which class action treatment is obviously appropriate. Quite the contrary, it seems decidedly inappropriate." *Id.* at 682.

First, Judge Posner noted that "the case involves different conveyances by and to different parties made at different times over a period of more than a century (railroading began in the United States in the 1830s)." *Id.* at 682. Second, those conveyances occurred "in 48 different states (plus the District of Columbia) which have different laws regarding the scope of easements." *Id.* (citations omitted). Furthermore, the court found that the myriad applicable laws "have changed over the period embracing the grant of property rights to railroads." *Id.* (citation omitted). Finally, the court stated that the "application [of those laws] involves intricate legal and factual issues illustrated by *Davis v. MCI Telecommunications Corp.*, 606 So. 2d 734, 737 (Fla. App. 1992) (per curiam), making it unlikely that common issues predominate over individual-claim issues." *Id.* In summary, the Seventh Circuit concluded, "This is a nightmare of a class action." *Id.*

The "nightmare" described by Judge Posner arises out of the difficulty of managing the litigation and trial of class actions that require determination of such numerous and different factual and legal issues under the laws of 49 jurisdictions, and the application of the law to the facts. In just one example of such difficulties, "the court would face an impossible

task of instructing a jury on the relevant law." *Harding v. Tambrands*, 165 F.R.D. 623, 630 (D. Kan. 1996). Such a complicated approach would significantly delay resolution of the parties' disputes while creating high legal costs and tying up the financial and personnel resources of the court.

In contrast to the *Isaacs* case, Judge Cudahy explained that problems associated with the need to litigate a wide variety of factual and legal issues would not plague the certification of a settlement class in the present case:

> Plaintiffs' and all class members' claims arise from defendant's installation and maintenance of fiber-optic cable on railroad rights of way. Any harm rising from that installation has occurred and is capable of being ascertained. All class members also raise the same legal claims. Therefore, the class has sufficient unity for settlement class certification purposes.

Smith, 387 F.3d at 618.

Indeed, the Third and Tenth Circuits are in disagreement with the Seventh Circuit regarding the ability of courts to certify a settlement class where certification of a litigation class would be inappropriate. *See, e.g., In re Warfarin Sodium Antitrust Litig.*, 319 F.3d 516 (3rd Cir. 2004) (upholding certification of settlement class that posed potential for "intractable management problems" if case were to proceed to litigation); *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180 (10th Cir. 2002) (upholding certification of settlement class where certification of litigation class was twice denied); *see also* Pet. for Writ of Cert. at 13-15. The Court's direction in resolving this split of authority is needed.

II. THE SETTLEMENT CLASS CERTIFICATION CANNOT BE OVERTURNED ON THE GROUND THAT PLAINTIFFS AND THEIR COUNSEL WERE PURPORTEDLY "DISARMED."

The Seventh Circuit's opinion below misconstrues this Court's comments regarding "disarmed counsel" in *Amchem*, as controlling consideration of the adequacy of a proposed class settlement. As Judge Cudahy explained in his dissent below, *Amchem* does not stand for this proposition. *Smith*, 387 F.3d at 615. Rather, the concept of "disarmed" counsel is used as simply *one reason* why the commonality and the other requirements under Rule 23(a) and Rule 23(b) are to be considered in a settlement class.[11]

Even more surprising is that the appeals court chose to characterize the class plaintiffs and their counsel in this settlement negotiation as "disarmed" because the federal class could not be certified for litigation. These parties are entangled in numerous state class action lawsuits and other federal class action lawsuits that would proceed absent approval of the federal nationwide settlement class and the accompanying stay of competing claims. The Seventh Circuit has long recognized the practice of forcing defendants into what Judge Posner called "blackmail settlements" through the filing of one, not to mention multiple, class action lawsuits, which are costly to defend and carry the risk of crushing damages awards if challenged at trial. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1299 ("[Class action defendants] may not wish to roll these dice. That is putting it mildly. They

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[11] *Amchem*, 521 U.S. at 621 ("[I]f a fairness inquiry under Rule 23(e) controlled certification, eclipsing rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and the court would be disarmed."); *accord id.* at 601 (noting that *Amchem* "exclusively involv[ed] plaintiffs *without* already pending lawsuits").

will be under intense pressure to settle.").[12]

In fact, there is a real threat of massive state-by-state litigation if the national settlement class is not approved, particularly in light of the potential for the award of punitive damages in certain jurisdictions. This is illustrated by the past practices of a few high-profile plaintiffs' lawyers who have threatened to file massive class action or coordinated lawsuits throughout the country, with the apparent intention of forcing "blackmail settlements" from various industries.

For example, a well-financed group of plaintiffs' counsel sought to "bring the entire lead paint industry to its knees"[13] through state-sponsored lawsuits nationwide. Most of these suits have themselves buckled – but obtaining dismissal resulted in substantial (i.e., costly) briefing and argument on the part of the defendants.[14] In another example, a group of similarly well-financed plaintiffs' lawyers announced that they planned to file coordinated class action lawsuits against health maintenance organizations to "level the playing field"

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[12] *Cf. In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) (noting opportunities for "legalized blackmail" through class action abuse), *cert. denied*, 516 U.S. 824 (1995); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (characterizing high-pressure class action settlements as "judicial blackmail").

[13] *See* Mark Curriden, *Tobacco Fees Give Plaintiffs' Lawyers New Muscle for Other Litigation*, Dallas Morning News, Oct. 31, 1999 (quoting plaintiffs' attorney in lead pigment litigation).

[14] *See, e.g., City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126 (Ill. App. Ct. 2005); *In re Lead Paint*, No. MID-L-2754-01 (Super. Ct., Law Div., Middlesex County, N.J., November 4, 2002) (dismissing 26 consolidated cases by municipalities); *County of Santa Clara v. Atl. Richfield Co.*, No. CV 788657 (Super. Ct., County of Santa Clara, Cal., July 8, 2003) (dismissing claims by 12 local governments).

between consumers and the HMOs.[15] This announcement was immediately followed by a dramatic plunge in the price of managed care stocks, which subsequently plummeted to half their highs for the year.[16] One plaintiffs' lawyer involved in these primarily federal court suits counseled stock analysts and institutional investors about the potentially disastrous effect that class action litigation could have on prices of managed care stocks.[17] While stating that his goal "is not to simply shake a settlement out of the industry," he told the media: "If HMO investors were smart, they'd lean on their companies to see if we can work something out."[18]

It is clear from these and numerous other examples that plaintiffs' counsel who plausibly threaten the prosecution of multiple class action lawsuits have a significant amount of bargaining power in settlement negotiations. *See* S. Rep. No. 109-14 (2005). Judge Cudahy aptly described the situation in his dissent below: "Far from being the classic disarmed counsel, these counsel have the fabled weapons of mass destruction." *Smith*, 387 F.3d at 616. Even if certification of a settlement class could be defeated simply because class counsel were "disarmed," here, the rhetoric does not match the reality, and intervenors cannot avail themselves of this piquant but inapt characterization.

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[15] Laurie McGinley & Milo Geyelin, *Attorneys Prepare Suits Against HMOs: Class-Action Strategy Used Against Tobacco Industry Is Readied for New Push*, Wall St. J., Sept. 30, 1999, at A3.

[16] *See* Collin Levey, *Three Ways to Shake Down an HMO*, Wall St. J., Jan. 3, 2000, at A19.

[17] *Id.*

[18] *Id.* (quoting Mississippi plaintiffs' lawyer Richard Scruggs).

III. NATIONAL INTERESTS IN INTERSTATE COMMERCE SUPPORT CERTIFICATION OF A SETTLEMENT CLASS.

Amicus agrees completely with petitioners: the requirements of Rule 23 have been satisfied and the nationwide settlement class should be approved. Assuming for the sake of argument that there is a close question about approval of this class, it is appropriate to consider the impact of the case on interstate commerce[19] and national policy.[20]

A nationwide settlement is more consistent with national policy, which typically favors a comprehensive approach to address industries that can only function effectively as an integrated system. Here, a national settlement is likely to encourage the development of transcontinental communications services beneficial to consumers, business and government. On the other hand, potential or actual inconsistent judgments in individual cases may impede the cost-effective development of new communications infrastructure. Thus, the Seventh Circuit's majority opinion, which would compel such a result, "forfeits the manifest advantages of a national

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[19] As Chief Justice Marshall recognized in 1824, the Commerce Clause reflects the substantial federal interest in regulating "that commerce which concerns more States than one" (as opposed to "the exclusively internal commerce of a State"). *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 194-95 (1824).

[20] Historically, when courts have dealt with issues where there was uncertainty in a specific area of the law, they have applied the rule of reason and been guided by fundamental principles of law and public policy. *See* Victor E. Schwartz et al., *Prosser, Wade & Schwartz's Cases and Materials on Torts* (10th ed. 2000). For example, in applying a test for recovery for negligent infliction of emotional distress under the Federal Employers' Liability Act, this Court has underscored the importance of taking into account public policy considerations, such as balancing the right of recovery with the need to avoid "the very real possibility of nearly infinite and unpredictable liability for defendants." *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532-545-46 (1994).

settlement for a national undertaking." 387 F.3d at 617 (Cudahy, J., dissenting).

The importance of these considerations is well appreciated by the railroad industry, which is the oldest, most firmly established national undertaking in this country. Though owned, financed and operated by individual, private companies, the railroad network, which dates to the first half of the nineteenth century, is well-recognized as an integral (perhaps the archetypal) instrumentality of interstate commerce. As one federal judge noted, "[f]or years, the industry has played a vital role in many areas including: transportation, communication, gas and electric and many other public needs."[21]

Congress has long favored uniform, national regulation of railroads as the most effective means of promoting efficient and safe operations, beginning with the Interstate Commerce Act[22] and the Safety Appliance Acts[23] of the nineteenth century. This Court, and the lower courts, consistently have supported a consistent national approach to rail regulation, and have rejected the piecemeal application of state law. This policy has been confirmed more recently by

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[21] *Hynek v. MCI WorldCommunications, Inc.*, 202 F. Supp. 2d 831, 838 (N.D. Ind. 2002) (citing Danya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-To-Trails, Utility Licenses, And The Shifting Scope of Railroad Easements From the Nineteenth to the Twenty-First Centuries*, 27 Ecology L. Q. 3561,461 (2000)).

[22] Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (Feb. 4, 1887) (giving Interstate Commerce Commission broad authority to regulate practically every aspect of railroad operations).

[23] *See, e.g.*, Safety Appliance Act, ch. 196, 27 Stat. 531 (Mar. 2, 1893) ((formerly codified as amended at 45 U.S.C. §§ 1-16, now codified at 49 U.S.C.§ 20301 *et seq.*) (first in a series of railroad safety statutes; establishing uniform national standards for "safety appliances" on railroad cars).

enactment of the Federal Railroad Safety Act[24] and the Interstate Commerce Commission Termination Act,[25] and manifests Congress' belief that solutions to disputes involving national industries typically are most effective if applied in a uniform manner. Here, where the purposes of Rule 23 are otherwise met, solutions of this nature should be encouraged, not precluded.

In this case, the public at large would be likely to benefit from a national settlement that provides finality to these lawsuits and encourages future developments in the communications industries. Encouraging the expansion of broadband communications will benefit smaller communities as well as major cities, which in turn will allow significant developments in medicine, law enforcement and education. For example, in newly developing procedures made possible in part by developments in communications technologies, doctors have performed surgery on patients who are hundreds of miles away by controlling robotic arms from a computer console.[26]

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[24] Federal Railroad Safety Act of 1970 (FRSA), Pub. L. No. 91-458, 84 Stat. 971 (Oct. 16, 1970) (codified as amended at 49 U.S.C. § 20101 *et seq.*) (comprehensive nationwide regulation of railway safety).

[25] Interstate Commerce Commission Termination Act,. Pub. L. No. 104-88, 109 Stat. 803 (Dec. 29, 1995) (codified at 49 U.S.C. § 10101 *et seq.*) (manifesting Congressional intent significantly to deregulate the railroads while maintaining oversight in the economic sphere).

[26] Michael Gagner, chief of the Department of Laparoscopic Surgery at Mount Sinai Medical Center in New York participated in a U.S. to France surgery in 2001. He said then: "As the technology evolves and becomes available, and wiring is more widespread, it will be useful for telementoring, teaching, and performing rare surgery that requires different expertise. . . . A smaller city could have the help of an expert surgeon just by being connected." D.L. Parsell, *Surgeons in U.S. Perform Operations in France via Robot*, Nat'l Geo. News, Sept. 19, 2001, *available at* www.nationalgeographic.com. *See also* Wright & Hester, *supra*, 27 Ecology L.Q. at 463 (discussing benefits of installation of fiber optic

This litigation can be resolved with no detriment to the parties' rights through approval of the national settlement class approved by the district court below. The important issues in this litigation should not be relegated to numerous individual federal and state courts to decide. Weighing the appropriate trade-offs in cases concerning the national economy and national welfare is unlikely to be accomplished effectively when undertaken by multiple jurisdictions applying a patchwork of laws. This is particularly so when the trade-offs involve benefits that accrue outside the jurisdiction of the forum and detriments that accrue inside the jurisdiction of the forum.[27] Where the litigation implicates national policy, a unified resolution is far preferable.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Association of American Railroads requests that this Court grant the Petition for a Writ of Certiorari in this action.

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cables in railroad easements as including "increased 911 services, emergency communications and linkages, clear and inexpensive long distance services and lower local telephone rates made possible by competition among providers").

[27] *See, e.g., Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991).

Respectfully submitted,

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